

It's All About Justice: Making Sense of Connections Between Criminal Justice, Civil Rights, and Social Justice

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In this paper, the author defines the terms criminal justice, civil rights, and social justice. Using major theories of justice (and especially “libertarian egalitarianism” from theories such as John Rawls and David Miller), the paper illustrates connections between the three terms, and the author then offers concrete examples of how the practices are (and should be) connected in the real-world. Note that this paper was written in response to the theme of the 2023 Annual Conference of the Academy of Criminal Justice Sciences, titled, “Critical Connections Between Civil Rights, Crime, and Social Justice”.

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Introduction

In academic disciplines such as criminal justice, most of what we address in our teaching and research deals in some way to issues of justice. Civil rights, crime, and social justice—the collective themes of this year’s Academy of Criminal Justice Science’s annual conference—all pertain to justice. In this paper, I define each of these terms, and then show their theoretical connections, using major theories of justice (and especially “libertarian egalitarianism” from theories such as John Rawls and David Miller). I then offer concrete examples of how the terms, in practice, are (and should be) connected in the real-world.

Defining Key Terms

Civil Rights

I begin with a definition of the key terms of focus in this paper. First, civil rights comprise “the nonpolitical rights of a citizen” and most notably “the rights of personal liberty guaranteed to U.S. citizens by the 13th and 14th amendments to the Constitution and by acts of Congress” (Merriam-Webster, 2022). Civil rights are enforceable rights, “which if interfered with by another gives rise to an action for injury”. They are “provisions that stem from notions of equality”. Keep in mind that civil rights are not found in the Bill of Rights; rather “they deal with legal protections, such as the right to vote” (Cornell, 2022). Those rights found in the Bill of Rights are civil liberties. Britannica (2022) explains that civil liberties are “freedoms that are secured by placing restraints on government” whereas civil rights are “secured by positive government action, often in the form of legislation”. Thus, laws protecting civil rights aim to assure “full and equal citizenship for people who have traditionally been

discriminated against on the basis of some group characteristic". Britannica (2022) adds that civil rights are "guarantees of equal social opportunities and equal protection under the law, regardless of race, religion, or other personal characteristics". Britannica offers the following as examples of rights: the right to vote; the right to a fair trial; the right to government services; the right to a public education; and the right to use public facilities. Essentially, civil rights assure people of the right to participate in their democracy.

According to the US Department of Health and Human Services (HHS) (2022):

Civil rights are personal rights guaranteed and protected by the U.S. Constitution and federal laws enacted by Congress, such as the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990. Civil rights include protection from unlawful discrimination.

The HHS Office for Civil Rights (OCR) "enforces civil rights laws that prohibit discrimination on the basis of race, color, national origin, disability, age, religion, and sex (including pregnancy, sexual orientation, and gender identity) by certain health care and human services entities", as well as by "state and local social and health services agencies, hospitals, clinics, nursing homes, insurers who are participating in the Marketplaces and receiving premium tax credits, and other entities receiving federal financial assistance from HHS".

Crime

Crime of course, refers to violations of the criminal law. There is no need to expand this term for purposes of this paper.

Justice

Justice is typically defined as administering and maintaining what is just or right. According to a leading justice scholar, Michael Sandel (2009), there are three broad issues discussed and debated by scholars of justice theory—freedom, welfare, and virtue. Some justice theorists argue that what matters most for deciding what is right or just is freedom—whether individual rights are respected and protected. These scholars are called libertarians because they say what matters most for justice is liberty. For some, this means protecting civil liberties granted to citizens through the US Constitution (e.g., Rawls, 1971). For others it means assuring the right of people to pursue, own, and control property with minimal governmental interference (e.g., Hayek, 1960; Friedman, 1962; Nozick, 1974). The latter camp is often referred to as free market libertarians because most of their arguments are economic in nature.

Another school of thought is the egalitarian libertarians. These scholars suggest that what matters most for justice is equality of opportunity in society and taking care of the least advantaged citizens (e.g., Miller, 2003). There is a basic disagreement between free market and egalitarian libertarians; the former end up arguing against government interference in property exchanges even in cases where capitalism produces massive inequities between the wealthy and the poor, whereas the latter often argue for government intervention to make arrangements in society fairer for all and especially for the poor and needy.

Other justice theorists focus on welfare, or general well-being and happiness of people in society. They argue that what matters most for justice is the welfare of society, or its overall happiness. For example, Jeremy Bentham's (1789) utilitarianism says that whether something is just depends on whether it maximizes utility or the greatest happiness for the greatest number of people. Finally, other justice theorists argue that what matters most for justice is virtue, or moral goodness and righteousness. For example, Aristotle's theory suggests that

justice demands giving people what they deserve or what they are due (Ackrill, 1981). This means honoring and rewarding those values or virtues that are worthy of honor and reward. In order to make such determinations, we must first make decisions about what is good or righteous in the first place. There is a controversy between those, like Michael Sandel, who believe that justice theory cannot be silent on matters of virtue or the “good life” and those, like John Rawls, who always argue that it must be.

Social Justice

Social justice is a concept that is generally equated with individual rights and equality (Berry, 2005; Brighouse, 2005). As such it is most related to the libertarian and egalitarian theories of justice, two theories of justice Americans hold dear, as reflected in our Declaration of Independence and US Constitution and the due process of law these documents celebrate and establish (American Constitution Society, 2023; Natelson, 2021; Rosen & Rubenstein, 2023). Two major theories that focus on liberty and equality are John Rawls’ “justice as fairness” and David Miller’s “pluralistic theory of justice”. Each is discussed below.

John Rawls. John Rawls posits a theory of social justice commonly referred to as “justice as fairness”. Rawls and Kelly (2001, pp. 5-6) set out to sketch a theory of social justice that would answer the questions: “once we view a democratic society as a fair system of social cooperation between citizens regarded as free and equal, what principles are most appropriate to it?” and “...which principles are most appropriate for a democratic society that not only professes but wants to take seriously ... that citizens are free and equal, and tries to realize that idea in its main institutions?” Rawls develops his theory for a democratic system of government, and he assumes that society is composed of a fair system of social cooperation between free and equal citizens. He also assumes that society is well-organized and regulated by a public perception of justice. Further, he assumes that society is guided by rules and procedures that are publicly recognized and agreed to, and that the rules specify fair terms of cooperation and are rooted in the notion of reciprocity or mutuality so that each person has a chance to promote his or her own advantage or good. Thus, his theory is aimed at determining the “political conception of justice for specifying the fair terms of cooperation between citizens regarded as fair and equal and as both reasonable and rational ... (Rawls & Kelly, 2001, pp. 7-8).

Rawls’ conception of social justice is developed around the idea of a social contract, whereby people freely enter into an agreement to follow certain rules for the betterment of everyone, without considering the implications of these rules for their own selfish gain. Rawls posits that rational, free people will agree to play by the rules under fair conditions and that this agreement is necessary to assure social justice because public support is critical to the acceptance of the rules of the game. These rules or principles “specify the basic rights and duties to be assigned by the main political and social institutions, and they regulate the division of benefits arising from social cooperation and allot the burdens necessary to sustain it” (Rawls & Kelly, 2001, p. 7). Thus, social justice is about the advantages and disadvantages of society and how they should be distributed. This also is asserted by David Miller (2003), whose theory of social justice is reviewed later in the paper.

Rawls does not suggest that everyone will agree with what justice specifically requires in given situations, but rather that his conception of justice as fairness can fit into “conflicting doctrines” because of what he calls “overlapping consensus”. That is, people agree enough about the basic principles of justice he offers that even when they disagree about larger moral, religious or philosophical issues, they can still agree about issues of social

justice (Rawls & Kelly, 2001, pp. 32-37). Finally, Rawls does not posit an unrealistically utopian vision of what is justice but instead offers a theory of social justice that is “realistically utopian” (Rawls & Kelly, 2001, p. 4). Rawls attempts to answer “[w]hat would a just democratic society be like under reasonably favorable by still possible historical conditions, conditions allowed by the laws and tendencies of the social world?”

To Rawls, social justice is about assuring the protection of equal access to liberties, rights, and opportunities, as well as taking care of the least advantaged members of society. Thus, whether something is consistent with social justice depends on whether it promotes or hinders equality of access to civil liberties, human rights, opportunities for healthy and fulfilling lives, as well as whether it allocates a fair share of benefits to the least advantaged members of society.

Rawls’ theory of “justice as fairness” can be summarized with three primary principles. They are:

(1) Each person has the same indefensible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all;

(2) Social and economic inequalities are to satisfy two conditions: First, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and

(3) Second, they are to be to the greatest benefit of the least-advantaged members of society (Rawls & Kelly, 2001, pp. 42-43).

By the least advantaged, Rawls is referring to those who lack what he calls “primary goods” (Rawls & Kelly, 2001, p. 53). Primary goods, according to Rawls, include

things needed and required by persons seen in the light of the political conception of persons, as citizens who are fully cooperating members of society, and not merely as human beings apart from any normative conception. These goods are things citizens need as free and equal persons living a complete life; they are not things it is simply rational to want or desire, or to prefer or even to crave. (Rawls & Kelly, 2001, p. 58)

Such goods include: The basic rights and liberties: freedom of thought and liberty of conscience, and the rest; freedom of movement and free choice of occupation against a background of diverse opportunities, which opportunities allow the pursuit of a variety of ends and give effect to decisions to revise and alter them; powers and prerogatives of office and position of authority and responsibility; income and wealth, understood as all-purpose means (having an exchange value) generally needed to achieve a wide range of ends whatever they may be; and the social bases of self-respect, understood as those aspects of basic institutions normally essential if citizens are to have a lively sense of their worth as persons and to be able to advance their ends with self-confidence (Rawls & Kelly, 2001, pp. 58-59).

It should be noted that Rawls and Kelly (2001, p. 13) acknowledge the importance of “human rights” as well. They write: “A just world order is perhaps best seen as a society of peoples, each people maintaining a well-ordered and decent political (domestic) regime, not necessarily democratic but fully respecting basic human rights”. Human rights are expansive and include many rights relevant to criminal justice including but not limited to the rights to life; liberty; security; equality before the law; fair and public hearings by independent and impartial tribunals; presumption of innocence until proven guilty; freedom of peaceful assembly and association; the right to participate in government; freedom from slavery, servitude, torture or cruel, inhuman or degrading treatment or punishment; discrimination; arbitrary arrest, detention, or exile; arbitrary interference with privacy; among many others.

To Rawls, liberty is the most important element of social justice because the three principles are ordered in terms of importance; this means the first principle (the “equal liberties principle”) should be achieved before efforts to achieve the second principle (the “equal opportunity principle”) and third principle (the “difference principle”) are attempted. The second and third principles should “always to be applied within a setting of background institutions that satisfy the requirements of the first principle (including the requirement of securing the fair value of the political liberties) ...” (Rawls & Kelly, 2001, p. 46). Background institutions refer to basic structures of society (e.g., family, school, religion, economy, polity), which, when just, can be referred to as “background justice” (Rawls & Kelly, 2001, p. 10). Logically, agencies of criminal justice are included in these societal institutions.

Not only can Rawls’ first principle be differentiated from the second in terms of priority or importance, but each also has its own scope. That is, each is meant to have its own unique applications. According to Rawls, the first principle applies to the “constitutional essentials” whereas the second applies to “the background institutions of social and economic justice in the form most appropriate to citizens seen as free and equal” (Rawls & Kelly, 2001, pp. 47-48). Rawls explains that the principles of justice as fairness are adopted and applied in a four stage sequence. The first is the adoption of the principles of justice to regulate a society. Rawls and Kelly (2001) assert that these must be adopted behind a “veil of ignorance”, which exists when there is a limit on information because

parties are not allowed to know the social positions or the particular comprehensive doctrines of the people they represent. They also do not know persons’ race and ethnic group, sex, or various native endowments such as strength and intelligence, all within the normal range. (p. 15)

The second phase is the constitutional convention, which sets forth the institutions and basic processes of governance. The third stage is the legislative stage, where just laws are enacted. Finally, the fourth stage is the application of the rules by administrators, the interpretation of the constitution and laws by the judiciary, and the following of the rules by members of society in the conditions required by justice as fairness.

David Miller. David Miller posits a pluralistic and circumstantial theory of social justice that is built around those principles of justice that people actually hold. Miller (2003) develops his theory for a democratic system of government, and he assumes that society is a living organism composed of individuals, groups, and so forth who believe in social justice because it specifies the institutional arrangements that allow for full contributions by and well-being of members of the society. Further, his theory assumes a bounded society with members; that there are specific institutions to which the principles of social justice apply; and that the state is the agency capable of changing structures when necessary. The theory can be considered pluralistic or circumstantial because different parts of his conception of social justice are more or less relevant depending on the circumstances. That is, social justice depends on the context of given situations.

Criminal justice scholars often refer to “blind justice” when discussing how factors such as race, ethnicity, gender, social class, and other extra-legal factors should not impact outcomes of justice (Robinson, 2009). Millers’ goal was to discover those principles people actually use when judging whether parts of society are just or unjust. Miller created his theory from public opinion polls and studies of public opinion with regard to different elements of justice. He does this in part because, while social justice must be “critical” in nature so that changes toward more fairness in society can be achieved, it must not be utopian. That is, it must be supported by citizens and can

realistically be achieved; this is something with which John Rawls agreed. It is important to note that Miller finds that people's views of justice are actually pluralistic in that they are determined by the context of a situation. This suggests that whether something is judged as just or unjust depends not only on the principles of justice that people hold but also in part on the nature of the situation.

To Miller, social justice deals with the distribution of good (advantages) and bad (disadvantages) in society, and more specifically with how these things should be distributed within society. Further, social justice is concerned with the ways that resources are allocated to people by social institutions. Some of the advantages relevant for social justice include money, property, jobs, education, medical care, child care, care for the elderly, honors and prizes, personal security, housing, transportation, and opportunities for leisure. Some of the disadvantages include military service, dangerous work, and other hardships. Logically, punishment for wrongdoing would also be considered a disadvantage. Keep in mind that Miller's theory applies to both public goods as well as private commodities.

Whether something is just or unjust thus depends on whether advantages and disadvantages are distributed appropriately in society. Miller (2003) explains that when

we attack some policy or some state of affairs as socially unjust, we are claiming that a person, or more usually a category of persons, enjoys fewer advantages than that person or group of persons ought to enjoy (or bears more of the burdens than they ought to bear), given how other members of the society in question are fairing. (p. 1)

Miller clearly points out that, when considering policies to allocate advantages and disadvantages, we must not judge them based on how they benefit us personally: "Justice is about assigning benefits whose values are established by their worth to the relevant population taken as a whole, and it must be blind to personal preferences (Miller, 2003, p. 8, emphasis added). Further, Miller (2003, p. 22) says that "justice fundamentally requires us to treat people as equals; or we should understand justice as what people would agree to in advance of knowing their own stake in the decision to be reached".

Social justice efforts can not merely be rationalizations of self-interest; this is another concept agreed to by John Rawls. To Miller, social justice is a social virtue that pertains to what you are due or owed, as well as what you owe others. It requires that everyone agrees to treat others as equals in a manner that is not egocentric or selfish. This does not mean that everyone has to agree on all procedures to bring about justice, for people generally agree on what justice demands (this is called the stability of justice).

Miller's theory focuses on the concepts of need, desert, and equality. Need is a claim that one is lacking in basic necessities and is being harmed or is in danger of being harmed and/or that one's capacity to function is being impeded (Miller, 2003, pp. 207, 210). Desert is a claim that one has earned reward based on performance, and that superior performance should attract superior recognition (Miller, 2003, pp. 134, 141). Equality refers to the social ideal that society regards and treats its citizens as equals, and that benefits such as certain rights should be distributed equally (Miller, 2003, p. 232).

Miller's (2003, p. 25) theory asserts that whether need, desert, or equality takes precedence depends on which "mode of human relationship" is being considered. This is because "we can best understand which demands of justice someone can make of us by looking first at the particular nature of relationship". A mode of human relationship refers to the different kinds of relationships that people have with one another. Miller specifies

three basic modes of human relationships, including the solidaristic community, instrumental associations, and citizenship. A solidaristic community “exists when people share a common identity as members of a relatively stable group with a common ethos” (e.g., family relations). In this mode of human relationship, the principle of distribution according to need is most relevant:

Each member is expected to contribute to relieving the needs of others in proportion to ability, the extent of liability depending upon how close the ties of community are in each case ... Needs will be understood in terms of the general ethos of the community. Each community embodies, implicitly or explicitly, a sense of the standards that an adequate human life must meet, and it is in terms of this benchmark that the much-contested distinction between needs, which are matters of justice, and mere wants is drawn. (Miller, 2003, p. 27)

Miller is clear to differentiate needs (meeting what is minimally necessary to avoid harm) versus wants or preferences. Needs are also held to be community-specific rather than individual-specific and thus can vary across places. Instrumental associations exist when “people relate to one another in a utilitarian manner; each has aims and purposes that can best be realized by collaboration with others” (e.g., economic relations). In this mode of human relationship, the principle of distribution according to desert is most relevant:

Each person comes to the association as a free agent with a set of skills and talents that he deploys to advance its goals. Justice is done when he receives back by way of reward an equivalent to the contribution he makes. A person’s deserts, in other words, are fixed by the aims and purposes of the association to which she belongs; these provide the measuring rod in terms of which relative contributions can be judged. (Miller, 2003, p. 28)

Desert is measured based on actual performance rather than efforts or attributes. It assumes that superior performance (not superior talents) should attract superior reward. Desert lies at the heart of a meritocratic system. Finally, citizenship refers to “members of a political society” in “modern liberal democracies” who

are related not just through their communities and their instrumental associations but also as fellow citizens. Anyone who is a full member of such a society is understood to be the bearer of a set of rights and obligations that together define the status of citizen. (p. 30)

In this mode of human relationship, the principle of distribution according to equality is most relevant because everyone in the society is deemed equal in terms of certain rights (Miller, 2003, p. 30). Here, every citizen deserves equal rights.

Because of the citizenship mode, human rights play a significant role in Miller’s theory of social justice. Miller (2003) explains that

a central element in any theory of justice will be an account of the basic rights of citizens, which will include rights to various concrete liberties, such as freedom of movement and freedom of speech ... an extensive sphere of basic liberty is built into the requirements of social justice itself. (p. 13)

As introduced earlier, human rights are expansive and include rights in many areas.

Conclusion: Connections Between Criminal Justice, Civil Rights, and Social Justice

So, what are the connections between criminal justice, civil rights, and social justice? One could argue that perhaps two fundamental purposes of criminal justice are to (1) protect civil rights; and (2) help bring about social

justice. With regard to the first point, there is a Civil Rights Division of the U.S. Department of Justice that is responsible for protecting civil rights by

enforcing Federal statutes that prohibit discrimination on the basis of race, color, national origin, sex, disability, and religion. These Federal laws prohibit discrimination in education, employment, credit, housing, public accommodations, voting, and in certain federally-funded and conducted programs, among other areas.

While civil rights violations are not technically crimes, enforcement of the law is generally viewed as being part of criminal justice, and thus, one could make the argument that enforcing civil rights laws is in the purview of criminal justice. But, civil rights violations are also sought in cases where criminal actions deny people “personal liberties and safety”, meaning civil rights violations often are crimes; enforcing criminal laws certainly is part of criminal justice.

With regard to the second point, one could argue that the foundation of the criminal justice system is the US Constitution. And the US Constitution is consistent with both John Rawls justice as fairness and David Miller’s pluralistic theory of justice, as the Constitution is in large part about assuring equal liberties for all. Protecting equal liberties and assuring equal opportunities (Rawls), and protecting equality (Miller) sound a lot like what criminal justice is all about though enforcement of the criminal law, as well as enforcement of civil rights laws for that matter.

Figure 1 is meant to depict relationships between criminal justice, civil rights, and social justice, with an explicit focus on the theories of Rawls and Miller. As you can see in the figure, the common element across the three areas is the notion of equality. And criminal justice can be thought of as an enforcement mechanism meant to assure equality by enforcing civil rights, protecting civil liberties, equally enforcing the law, and protecting equal opportunity.



Figure 1. Relationships between criminal justice, civil rights, and social justice.

While it is doubtful that a majority of Americans see the criminal justice system in the light that is depicted here, an analysis of America’s founding documents illustrates that the criminal justice system, is indeed, an

enforcement mechanisms of the values found in the Declaration of Independence and the US Constitution. Those values include things such as liberty, equality, and justice (i.e., civil rights), as will be shown below.

Consider these famous words from the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness”. Among the key words from this statement include equal, rights, life, liberty, and the pursuit of happiness. The equal right to liberty (i.e., civil rights) is at the heart of both Rawls’ and Miller’s theories of social justice. The criminal justice system protects those rights, as well as the right of people to life and happiness; being a victim of crime often interferes with both of these outcomes.

Then, there is the Preamble to the US Constitution, which states why the country was founded in the first place:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Among the key words from this passage include justice, domestic tranquility, common defense, general welfare, and liberty. Though the word justice is not defined in the Constitution, we get a good sense of what it means by examining the Bill of Rights, which expresses the basic equal liberties (i.e., civil rights) that Americans are to enjoy; these are the rights discussed by social justice thinkers such as Rawls and Miller. General welfare means well-being in society, and the criminal justice system, by enforcing the criminal law, helps protect this. And it should be obvious that the criminal justice system helps assure domestic tranquility, or peace in the nation, and the common defense (against enemies foreign and domestic, according to the Constitution), by arresting alleged offenders as well as preventing crime in the first place.

So, we see clear relationships between crime, criminal justice, and civil rights. By examining these concepts together, we get a different sense of what the criminal justice system is actually for. It is not just a network of agencies that exist to fight crime, but it is also a system that is aimed at protecting people’s equal liberties, and as such, is a civil rights protection mechanism.

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